



subsequently withdrew their protests.

4. On November 9, 1999, the Department conducted a hearing in the matter. The applicant was present and was represented by Lloyd Webb. Protestants Fred Kippes and Floyd Kaufman were present and represented themselves.

5. Issues identified by the protestants are as follows:

- a) The application will reduce the quantity of water under existing water rights.
- b) The water supply available itself is not sufficient for the purposes intended.
- c) The applicant does not have sufficient financial resources with which to complete the project.
- d) The application conflicts with the local public interest.
- e) The application is contrary to the conservation of water resources within Idaho.

6. Exhibits premarked, offered or accepted as a part of the record are as follows:

- a. Applicant's Exhibit 1 - "Deep Creek Fish Farm Effluent Study - Final Report" by Keya Collins and Ernest L. Brannon, Aquaculture Research Institute, University of Idaho, dated December 1993
- b. Protestant's Exhibit A - "The Upper Snake Rock Watershed Management Plan", October 25, 1999, Public Review Draft, The Middle Snake River Technical Advisory Committee
- c. Protestant's Exhibit B - "The Upper Snake Rock Subbasin Assessment", December 31, 1998, Proposed Final Draft, The Middle Snake River Technical Advisory Committee

7. Subsequent to the hearing, the hearing officer requested additional information from the applicant relative to the application. The applicant provided the information to the hearing officer and to the protestants for review and comment. The information provided is incorporated as supplemental exhibits in the matter and are described as follows:

- a. Applicant's Exhibit 2 - Report titled Irrigation Return Flow Water Quality in the Twin Falls and Northside Irrigation Tracts by R. Brett Barry - June 1996

- b. Applicant's Exhibit 3 - Report titled The Upper Snake Rock Watershed Management Plan by Dr. Balthasar B. Buhidar and others - December 20, 1999
- c. Applicant's Exhibit 4 - Letter dated August 23, 1999 to Leo Ray from Michael J. McMasters and a Consent Order between the applicant and DEQ signed in August 1999
- d. Applicant's Exhibit 5 - Agreement entered into on April 15, 1999 between the Twin Falls Canal Company and Leo E. Ray

8. On October 24, 1997, the Department issued Permit No. 47-08076 ("permit") in the name of Leo and/or Judith Ray as follows:

Source:	Unnamed streams tributary to Deep Creek
Priority:	January 14, 1988
Rate of diversion:	12 cfs
Point of diversion:	NWSE Section 8, T10S, R14E, B.M.
Use:	Fish propagation
Season of use:	Year-round
Place of use:	NWSE Section 8, T10S, R14E, B.M.

9. The Idaho Department of Health and Welfare, Division of Environmental Quality ("DEQ") will not approve the fish propagation facility associated with Permit No. 47-08076 ("permit") because it will increase the amount of phosphorous in the receiving water, which in this case is Deep Creek. DEQ, however, has entered into a consent order with the applicant allowing the fish propagation facility to be built, if the applicant provides mitigation to remove as much phosphorous from Deep Creek as the fish propagation facility adds to Deep Creek. Hence, the applicant plans to mitigate his fish propagation operation under Permit No. 47-08076 by removing as much or more phosphorous from Deep Creek using the ponds described in the application than the applicant will contribute to Deep Creek under the permit.

10. The applicant explained that the sole purpose of the application is to mitigate the water quality of Deep Creek to compensate for the development and use of water for fish propagation purposes under Permit No. 47-08076. More specifically, the applicant said he planned to construct two settling ponds on the eight acres he owns adjacent to Deep Creek, each pond being 24' wide x 150' long by 2' or 3' deep (total capacity of about 0.5 acre feet). The applicant plans to divert Deep Creek water to the settling ponds to allow sediment and phosphorous to settle out of the water. Effluent from the ponds would then be returned directly to Deep Creek through a ditch or returned to Deep Creek after flowing through wetland areas adjacent to Deep Creek. The applicant does not plan to raise any fish in the ponds.

11. Deep Creek and the Snake River downstream from Deep Creek are water quality limited reaches. Total suspended solids, fecal coliform and nutrients are water quality parameters that at times do not meet applicable water quality standards. The applicant has provided evidence that the mitigation project proposed in the application will reduce each of these parameters to improve water quality in these reaches.

12. The applicant explained that phosphorous attaches to clay particles and that after the ponds have been drained, the applicant would periodically remove the sediment and associated phosphorous from the ponds using a backhoe. This method of phosphorous removal is recommended by the DEQ.

13. The applicant intends to use his own equipment to construct the ponds and estimates the cost to be about \$1,000.

14. The applicant estimates that 2 cfs diverted from Deep Creek will be enough water to remove the required amount of phosphorous and sediment from Deep Creek water to allow his fish propagation facility to operate. The applicant is not entitled to divert more water than required to meet the mitigation plan approved by DEQ.

15. Operation of the fish propagation facility will create three full time jobs.

16. Evaporation from the ponds will consume water. This loss will be offset by shares of Twin Falls Canal Company water used on the land which the applicant does not intend to remove from the land.

17. Protestant Floyd Kaufman lives upstream from the applicant's proposed fish propagation facility and settling ponds. Mr. Kaufman is concerned that operation of the applicant's fish propagation facility will further impair the water quality of Deep Creek even if the applicant removes more sediment and phosphorous than the applicant contributes to Deep Creek.

18. Protestants Fred and Betty Kippes own land adjoining the applicant's land downstream from the applicant. The Kippes are concerned that fish propagation facilities, in general, have degraded waters in the Middle Snake River region including Deep Creek.

19. The protestants did not introduce evidence to show that the proposal of the applicant will worsen water quality in the region or in Deep Creek.

## **CONCLUSIONS OF LAW**

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

In all applications whether protested or not protested where the

proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the of water resources may reject such application and refuse issuance of a permit therefor... .

2. The protestants do not have water rights which will be impacted by the mitigation proposal of the applicant. Use of water as proposed in the application will not reduce the quantity of water under existing water rights.

3. The water supply itself is sufficient for the purposes intended.

4. The application is made in good faith and not for delay or speculative purposes.

5. The applicant has sufficient financial resources with which to complete the project.

6. The project can be constructed and operated to not conflict with the local public interest.

7. The application is not contrary to the conservation of water resources within Idaho.

8. The Department should approve the application with certain conditions.

## ORDER

IT IS THEREFORE, hereby ORDERED that Application for Permit No. 47-08429 in the name of Leo and/or Judith Ray is **APPROVED** subject to the following conditions and limitations:

1. Use of water under the right is subject to all prior water rights.
2. Proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before **April 1, 2001**.
3. The right holder or successors in interest shall not divert more than one-half (½) the rate of flow of water in Deep Creek as measured at the point of diversion under this right. The maximum rate of diversion also may not exceed a rate larger than required to meet the mitigation plan approved by DEQ.
4. A fish screen of ½ inch or smaller mesh shall be installed and maintained at the point of diversion.
5. After specific notification by the Department, the right holder shall install suitable measuring devices at the point of diversion from Deep Creek and at the point of effluent return to Deep Creek. Upon request of the Department, the right holder shall annually report the amount of water diverted from and returned to Deep Creek.
6. Water discharged from the settling ponds to Deep Creek shall comply with applicable water quality standards of the DEQ of the Idaho Department of Health and Welfare.
7. Use of water under the right may be affected by private agreements between the right holder and the Idaho Department of Fish and Game and the Twin Falls Canal Company.
8. The right holder shall return effluent from the settling ponds directly to Deep Creek and shall not divert the water for wetland use after use in the settling ponds of the right holder.
9. Diversion and use of water under this right is only valid in connection with operation of the fish propagation facility authorized by Permit No. 47-08076. The right holder is not authorized to raise fish or other aquatic life in the settling ponds or to make other beneficial uses of the water.
10. Use of water under the right shall be non-consumptive. The right holder shall retain ownership and control of the shares of Twin Falls Canal Company water used on the 8 acre project site.
11. The right holder shall submit plans for the check/diversion structure and for the return structure to the Department for review and approval prior to construction. In addition, the right holder shall provide evidence to the Department that DEQ has approved the mitigation proposal before working in the channel of Deep Creek.

12. Failure of the right holder to comply with any condition of approval of this permit is cause for the Department to cancel the permit.

Signed this 23rd day of March, 2000.

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L. GLEN SAXTON  
Hearing Officer